Supreme Court, U.S.
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No. 96-124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioners' interest in the collateral estoppel effect in a separate libel action of the jury verdict in this securities fraud class action is a direct, substantial, legally protectable interest as required by Rule 24(a)(2), Federal Rules of Civil Procedure to support intervention of right.

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Petitioners present two questions: the first is not presented by the record and the second factually incorrect.

The true question presented by this record is: whether Petitioners' interest in the collateral estoppel effect in a separate libel action of the jury verdict in this securities fraud class action is a sufficiently direct, substantial and legally protectable interest to secure intervention of right as required by Federal Rule of Civil Procedure 24(a)(2).[1]

In Question #2, Petitioners declare: "...no new factual or legal developments have occurred after entry of judgment except the agreement of the parties to settle the case." Petition for a Writ of Certiorari at p. *i* (hereinafter "Petition"). This is a misstatement. In fact, following entry of judgment on February 11, 1994, the Court of Appeals declared the judgment non-final and remanded to the District Court to resolve, *inter alia*, whether the Class Members were entitled to ownership of the debentures in addition to the damages awarded by the jury. See Order of U.S. Court of Appeals (R2-418).[2] Appendix to this Brief in Opposition to Writ of Certiorari, p. 1a (hereinafter "Purcell Appendix").

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[1] Petitioners had in the Court of Appeals also argued the District Court abused its discretion in denying permissive intervention under Rule 24(b)(2). The petition abandons this argument.

[2] Citations to "R__" are references to the Record on Appeal in the Court of Appeals.

This is not a meaningless detail, but the subject of a hotly contested issue of great importance, finally resolved by a settlement agreement providing for cancellation of the debentures and waiver by the Class Members of $839,378.99 in accrued interest. Petitioners' construct of the issue is flawed because it does not address the grounds upon which the Court of Appeals based its decision. Purcell v. Bankatlantic, et al., 85 F.3d 1508, Appendix of Petitioners, 1a. Properly put, the question is whether Petitioners' interest in the collateral estoppel effect in a separate libel action is the kind of direct, substantial and protectable interest legally adequate to support intervention of right in the securities fraud case. That a settlement may embody, as it did here, a provision for vacatur does not rewrite Rule 24(a)(2) or enlarge Petitioners' rights under it.

This case is about Rule 24(a)(2) and the status required to intervene in post-judgment settlement. The Court of Appeals applied the Rule properly. Petitioners' claim to intervention of right rests on a single case: U.S. Bancorp v. Bonner Mall Partnership, 513 U.S. ___, 130 L.Ed.2d 233, 115 S.Ct. 386, (1994).

Petitioners fail to recognize that the issue before the Court of Appeals in Purcell was whether or not Petitioners should be permitted to intervene. Petitioners urge this court to apply U.S. Bancorp language but that language would be

meaningful only if Petitioners were actually granted intervention and had become a party to the case.

STATEMENT OF THE CASE

The Petitioners' statement of the case is generally accurate, but omits reference to the other class action arising out of the same debenture exchange transaction. The other class action entitled Meador, et al. v. Bankatlantic Financial Corporation, et al., Case No. 91-29892, was filed during 1991 against BFC, Levan and others in Florida (Broward Circuit Court) as a securities fraud class action on behalf of a class composed of the "yes" voters in the 1989 exchange. (R3-443, pp. 2-9.) The Purcell class is composed of those limited partners whose vote on the exchange was recorded as "no." The attorneys for the Purcell class were not in any way involved in the filing or conduct of that action. The attorneys representing the plaintiff class in Meador carefully monitored the progress of the Purcell action because the Purcell action filed in 1989 would be, and ultimately was, the first case to go to trial. The Meador class action involved over 4,000 Class Members. The plaintiffs' attorneys in Meador concluded a settlement with Levan and BFC on behalf of that class prior to the Purcell settlement that ABC seeks to upset by this Petition. (R3-443, pp. 2-9.)

In other words, the Petitioners' statement of the case conveys an incorrect impression by suggesting that BFC and Levan, in attempting to settle Purcell, were interested merely in "seeking to erase the jury's verdict and the resulting final judgment." (Petition, p. 5.) BFC and Levan were in the process of settling both class actions on identical terms, and the Meador class had not even obtained a verdict and judgment to erase. The $8 million jury verdict in Purcell was used as a settlement model in determining the amount of settlement in Meador. (R3-443, pp. 2-9.)

The Petitioners' statement of the case does point out that as the Purcell action approached trial the Levan libel action was pending in the Southern District of Florida. However, the Petitioners' statement of the case omits mention of the fact that Petitioners' attorneys attended the Purcell trial and purchased a "daily record" transcript of all testimony and obtained copies of all exhibits. Petitioners sat on the sidelines[3] watching the progress of the Purcell action but did not attempt to intervene or file an *amicus* brief.

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[3] Sitting on the sidelines without moving to intervene thereby protected Petitioner ABC from itself being collaterally estopped in the event the result of the trial turned out adverse to the Petitioner ABC position. See Blonder Tongue Labs v. University Foundation, 402 U.S. 313, 329, 28 L.Ed.2d 788, 800, 91 S.Ct. 1434, 1443 (1971).

The Purcell judgment that was vacated was non-final because in February, 1994 the Court of Appeals remanded the appeal of Levan and BFC in the Purcell case to the District Court to take care of "rescission" issues.[4] (Purcell Appendix, p. 1a.) This "cancellation of the debentures" issue became the rescission issue that required the Court of Appeals to remand the case to the District Court for amendment of the judgment. At that point, the Purcell Plaintiffs held a "non-final" judgment and faced the prospect of modification of that judgment by the District Court. In addition, the question of the amount of post-judgment interest to which the Purcell Plaintiffs would be entitled was an open issue in view of the non-finality of the judgment, as was the question as to the date when interest would begin to accrue.

The Purcell Plaintiffs, Levan and BFC embarked upon settlement negotiations and concluded a comprehensive settlement, the principal terms of which are:

a. The face amount of the verdict of $8 million is to be paid in two installments, $4 million immediately and $4 million 30 months later bearing 7% interest;

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[4] The District Court, over the objection of the Purcell Plaintiffs, had instructed the jury that a verdict in favor of the Plaintiffs would result in termination of liability in the debentures. The final judgment entered by the District Court did not provide for such.

b. The Purcell Plaintiffs waive their claim to pre-judgment and post-judgment interest which could have amounted at the time of settlement to $839,398.99; and,

c. The parties jointly request the District Court to vacate the verdict and judgment. This coupled with the Meador settlement brought all litigation arising from the 1989 debenture exchange to an end. (R3-443.)

Learning of the settlement, Petitioners moved to intervene in Purcell as of right under Rule 24(a)(2) and/or permissively. The motion was opposed by the Purcell Plaintiffs and Defendants. The District Court denied the motion to intervene. Petitioners appealed. The Court of Appeals decision which Petitioners seek review by Writ of Certiorari affirmed the District Court's decision in all respects, deciding, that Petitioners' "interest" in preserving for collateral estoppel purposes the Purcell verdict and judgment was not a direct, substantial and legally protectable interest sufficient to obtain intervention of right under Rule 24(a)(2). As will be seen later in this response, the Court of Appeals decision does not conflict with any decisions of any other United States Court of Appeals and, in fact, the only Court of Appeals decision on the issue of whether preservation of an interest in collateral estoppel is a

sufficiently important interest to permit intervention of right rules that it is not. [5]

ARGUMENT FOR DENYING PETITION: THE COURT OF APPEALS DID NOT REACH PETITIONERS' U.S. BANCORP ARGUMENT

Petitioners contend that the Purcell decision represents "a rejection of the core principles" articulated in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, supra. Petition, p. 21.

The Court of Appeals did not reach Petitioners' U.S. Bancorp argument.

The issue before the Court of Appeals in Purcell was whether or not Petitioners should be permitted to intervene. Petitioners' discussion of the U.S. Bancorp case involves a discussion of what would occur if and when Petitioners had been granted intervention and become a party to the case. In addition, Petitioners distort the U.S. Bancorp holding and its applicability to the case at bar. The first words of Justice Scalia's opinion in U.S. Bancorp show its plain thrust:

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[5] Izumi Seimitsu Kogyo v. U.S. Philips Corp., 971 F.2d 728 (Fed. Cir. 1993) certiorari dismissed as improvidently granted in 510 U.S. 27, 126 L.Ed.2d 396, 114 S.Ct. 425 (1993).

> The question in this case is whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari is sought.

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. ___, 130 L.Ed.2d 233, 238, 115 S.Ct. 386, 388 (1994).

U.S. Bancorp is not a precedent for this case and is readily distinguishable. It involved a dispute between the original parties made after the Supreme Court had granted a petition for certiorari. After the Court had received briefing on the merits the parties entered a settlement and a contested motion to vacate the judgment for mootness was made to the court. In the Purcell case there was no dispute between the original parties nor was there any review of the judgment sought by the original parties. Petitioners' motion to intervene to vacate would have had the District Court rewrite the settlement agreement by annulling that part of the settlement agreement dealing with vacatur. The relief requested would effectively have abrogated the entire agreement. Apart from the fact that U.S. Bancorp involved a party to the action who was objecting to vacatur, in Purcell the settlement agreement was reached prior to any final judgment being entered by the District Court.

U.S. Bancorp which is the centerpiece of the Petition, does not involve intervention, does not stand for the proposition

that a non-party may object to vacatur, and most importantly, does not involve a settlement agreed to by the parties prior to the entry of final judgment.

Unlike the instant case, U.S. Bancorp involved a motion to vacate a Court of Appeals decision which had become a precedent of national importance. The Ninth Circuit opinion which by motion the bank attempted to vacate, involved an important precedent relating to bankruptcy priority. There were several separate amicus briefs filed in the Supreme Court and, by the time U.S. Bancorp was decided, the Ninth Circuit opinion had been cited in over 28 reported cases in circuit courts, district courts and bankruptcy courts. U.S. Bancorp bears little similarity to the case at bar which involves vacatur of a non-final judgment by the District Court.

THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS

This case does not satisfy the considerations of Rule 10[6] for granting a Petition for a Writ of Certiorari. The decision of the Court of Appeals turned on the question whether Petitioners, admittedly not interested in the merits of this class action

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[6] Rules of the Supreme Court of the United States.

securities litigation (that is to say Petitioners did not claim any interest in the debentures and hence were not real parties in interest), had an interest sufficient to meet the requirements of Rule 24(a)(2) for intervening as of right. See Purcell v. Bankatlantic, et al., supra, at 1513, Appendix of Petitioners at 8a:

> [T]hat measured against the Rule 24 requirement that it be 'a direct, substantial, legally protectable interest,' ABC's (Petitioners') interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect and insubstantial to support intervention as of right. Purcell, supra, at 1513; Appendix of Petitioners at 9a.

The decision whether to grant intervention turned on the facts and procedural posture of the case in the record at the time of the motion to intervene. The District Court had diligently supervised this litigation for over five years and brought it to an end by approval of all of the terms of the final settlement. The settlement agreed the Defendants would pay the 3,711 Plaintiff Class Members the face amount of the jury verdict upon waiver of pre-judgment and post-judgment interest that had accrued, in exchange for stipulated motion to vacate the jury verdict and resulting judgment. Only at the time a final settlement agreement was concluded bringing the action and related litigation to an end, did Petitioners file their motion to intervene

and then merely to preserve a potential defense in a collateral and unrelated lawsuit against it.

The Court of Appeals in its *de novo* review of the record found that:

> Permitting ABC to intervene for the purpose of blocking the vacatur would substantially prejudice Levan and BFC [the Respondents] because unless vacated, the jury verdict and judgment in the class action will preclude their libel claim against ABC [Petitioners]. Moreover, permitting ABC to intervene in the class action would also substantially prejudice the Plaintiffs, because the result ABC seeks would effectively vitiate the settlement agreement through which the Plaintiffs are receiving payments from the damage award. Purcell, supra, 85 F.3d 1508 at 1514; Appendix of Petitioners at 11a.

The decision of the Court of Appeals turning on the facts and procedural posture of the case does not involve any conflict with any decision of any other United States Court of Appeals.

Petitioners assert as a reason this court should grant their petition is that there is a "division among the circuits," stating that the Court of Appeals here denied intervention "on its extremely restrictive reading of Rule 24(a)(2)'s requirement that an intervenor must have an interest relating to the property or transaction which is subject to the action." (Petition, p. 16). Petitioners assert "similarly restrictive views have been

articulated by the Third, Fifth and Eighth Circuits" and argue that "these views" conflict directly with the views of the "D.C. and Ninth Circuits." Petition, pp. 17-18. The Court of Appeals found that the Petitioners had not cited any binding authority to support their argument they should be granted intervention based upon their interest in the collateral estoppel effect of the jury's verdict. Purcell, supra, 85 F.3d 1508, 1512; Appendix of Petitioners at 8a. The Court of Appeals distinguished the two cases cited by Petitioners, National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989) and a dissenting opinion from the Supreme Court's dismissal of certiorari as improvidently granted in Izumi Seimitsu Kogyo v. U.S. Philips Corp., 510 U.S. 27, 126 L.Ed.2d 396, 114 S.Ct. 425 (1993). Purcell, Ibid.; Appendix of Petitioners, Ibid.

Decisions cited by Petitioners purporting to establish a conflict with a decision of another Court of Appeals are easily distinguishable on their facts which Petitioners do not set out in any event. These cases when their facts are examined, fail to establish a conflict of the Purcell decision with the decision of another Court of Appeals. See Petition, pp. 16-19. Petitioners only provide phrases extracted from decisions and by comparison of language in various opinions seek to establish a "conflict of views" among the circuits amounting to what Petitioners describe as a "major circuit conflict about the kind of

interest required for intervention as of right under Rule 24(a)(2)." Petition at p. 11. But as the court has taken note in Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813, 75 L.Ed. 728, 51 S.Ct. 214 (1931):

> It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted.

Petitioners rely on County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) as having "explicitly rejected the proposition that Rule 24(a) requires a 'specific legal or equitable interest' in the underlying property or transaction" as being in conflict presumably with language in the Purcell opinion that Rule 24 requires a "direct, substantial, legally protectable interest in the proceedings." See Purcell, supra 85 F.3d at 1512; Appendix Petition at 7a.

County of Fresno, which was an action to enjoin promulgation of a federal rule that would have injured intervenor's rights to purchase government land conferred by a Congressional enactment, pointed out in the opinion that the "individual members of (the intervenor) are precisely those Congress intended to protect with the reclamation acts...." On those facts the interest was held sufficient.

Petitioners, in their claim of conflict between the Eleventh and Ninth Circuit Courts of Appeal do not cite the later case of Greene v. U.S., 996 F.2d 973 (9th Cir. 1993) which denied intervention of right to the Tulalip Indian Tribe in an action by the Samish Indian Tribe against the government to obtain tribal recognition, the court holding Rule 24(a)(2) requires:

> [T]he movant must demonstrate 'a significantly protectable interest.' An economic stake in the outcome of the litigation, even if significant, is not enough. At p. 976.

Petitioners might just as well have claimed that the Purcell decision is in conflict with a leading Eleventh Circuit case on intervention of right, Chiles v. Thornburgh, 865 F.2d 1197, 1214 (11th Cir. 1989) where inmates in a federal detention facility were allowed intervention under Rule 24(a)(2) in an action challenging the government's operation of a detention facility as being insufficient to protect the security of a non-violent alien. The court in Chiles held the Rule 24(a)(2) requirement of "interest":

> is a flexible one, which focuses on the particular facts surrounding each [motion for intervention].

and also at p. 1214:

> The detainee's interest need not however, be of a legal nature identical to that of the class asserted in the main action. (Emphasis supplied.)

Petitioners' claim of a conflict between circuits based upon a supposed difference between the "extremely restrictive reading" of Rule 24(a)(2) of the Eleventh Circuit and the "far more flexible application" of Rule 24(a) "espoused" by the Second Circuit thus vanishes when the language Petitioners depend upon in United States v. Hooker Chemicals & Plastics, 749 F.2d 968, 983 (2nd Cir. 1984) to establish the conflict between the Circuits is compared with the language used by the Eleventh Circuit in the Chiles case. Both Circuits acknowledge the flexibility that Rule 24(a)(2) is intended to provide in the determination whether to grant intervention in each particular case depending upon its facts and procedural posture. United States v. Hooker Chemicals, supra affirmed the denial of a Rule 24(a)(2) intervention in an action by the U.S. Government against Hooker Chemical for hazardous waste. The claimed interest supporting intervention was the exposure of the proposed intervenors to drinking water which had been treated by Hooker Chemical. The decision turned on the adequacy of representation requirement of Rule 24(a)(2) by the government which was suing *parens patria*. Like the other cases cited by

petitioner, Hooker Chemical is distinguishable on its particular facts. No decision has been cited which is in conflict with the Purcell decision.

Petitioners' assertion that there is a "split on the meaning of Rule 24(a)(2)'s interest requirement as dividing Second, Sixth, Tenth and D.C. Circuits on the one hand, and the Fifth, Seventh, Eleventh and Federal Circuits on the other" does not stand scrutiny when the cases are analyzed. For example, City of Cleveland, Ohio v. NRC, 17 F.3d 1515 (D.C. Cir. 1994) is a case where an electrical co-op sought intervention under Rule 24(a)(2) in a proceeding before the Nuclear Regulatory Commission to challenge conditions in an operating permit for a nuclear plant. The court held that the proposed intervenor had no economic relationship to the power plants in question and its interest in the precedental effect of an adverse decision does not constitute interest sufficient to comply with the requirement of "interest" under Rule 24(a)(2). The court stated that under Rule 24(a)(2) proposed intervenor must satisfy Article III standing requirements in order to participate in litigation. The court stated that a proposed intervenor under Rule 24(a)(2) "must satisfy the same standing requirements as are imposed upon the original parties." If anything, the court in the City of Cleveland, Ohio case imposes a stricter requirement than the Eleventh Circuit which does not require a proposed intervenor under Rule

24(a)(2) to establish Article III standing requirements if there is a "justiciable case and controversy between the parties already in the lawsuit." Chiles v. Thornburgh, supra at p. 1213. Also in Alameda Water & Sanitary Dist. v. Browner, 9 F.3d 88, 90 (10th Cir. 1993) the court in affirming denial of intervention sought by an environmental group in an action by a water district against the EPA, challenging the EPA's veto of a permit to discharge fill material into U.S. waters, held that under Rule 24(a)(2) "intervention requires that [proposed intervenors'] interest in the proceedings be 'direct, substantial and legally protectable.'" This language used by the D.C. Circuit cannot arguably be held to be in conflict with the language of the court in the Purcell case which Petitioners quote as being the source of conflict in views between the circuits "direct, substantial, legally protectable interest in the proceedings." (Petition at pp. 16-17.) U.S. v. State of Michigan, 680 F.Supp. 928 (D.C. W.D. Mi. 1987), in a circuit Petitioners contend is in conflict with the Eleventh Circuit in its "views" of the interest requirement for Rule 24(a)(2), allowed intervention by inmates of a Michigan prison in an action sought by the United States challenging conditions in another Michigan prison. The facts are remarkably similar to those in Chiles v. Thornburgh, supra which allowed intervention under similar circumstances. The District Court in the Michigan case held that the prisoner's interest in the

proceedings was "an interest relating to the property or the transaction which is the subject of the action." Petitioners' contention that the Eleventh Circuit employs an "extremely restrictive reading of Federal Rule of Civil Procedure 24(a)(2)'s requirement that an intervenor of right have 'an interest relating to the property or transaction which is the subject of the action'" falls apart when the facts and holding in Chiles v. Thornburgh, supra are compared with the very similar Sixth Circuit case also allowing intervention by inmates in a pending suit.

Petitioners have put forth a misleading citation purporting to establish "the stark conflict between the Circuits." (Petition at p. 19, fn. 14.) The citation from Charles A. Wright, et al., Federal Practice & Procedure, §1908 is incomplete and misleading. All that Petitioners quote from that text is statement that there has been "[no] clear definition, either from the Supreme Court or from the lower courts, of the nature of the interest" required by Rule 24(a)(2). The complete quotation which more accurately reflects the author's analysis is as follows:

> There is not as yet any clear definition of the nature of the 'interest relating to the property or transaction which is the subject of the action' that is required for intervention of right. Indeed, it may well be that this is a question not worth answering. (Emphasis supplied.)

> 'Significantly protectable interest' has not been a term of art in the law and there is sufficient room for disagreement about what it means so that this gloss on the rule is not likely to provide any more guidance than the bare term 'interest' used in Rule 24 itself.
>
> It is worth emphasizing that intervention of right may not be had in every case in which a decision might have an inhibiting effect as *stare decisis.*

7C, C. A. Wright, et al., Federal Practice & Procedures, §1908 at 263, (Second Edition) and at p. 17, 1996 Supplement.

The Purcell case presents a familiar pattern of the application by a District Court of Rule 24(a)(2). The Court of Appeals, after review de novo, affirmed the District Court in denying Petitioners' Motion to Intervene as of right under Rule 24(a)(2).

Petitioners' motion to intervene called upon the District Court to exercise its judgment balancing

> [T]he various components of the Rule...read also in the context of the particular statutory scheme that is the basis for the litigation and with an eye to the posture of the litigation at the time the motion is decided...common sense demands that consideration also be given to matters that shape a particular action or particular type of action.

3B, James Wm. Moore, Moore's Federal Practice, Second Edition, ¶24.07[1] at pp. 24-44 citing International Paper Co. v.

Town of Jay, 887 F.2d 338, 343-44 (1st Cir. 1989); United States v. Hooker Chems.& Plastics, Inc., 749 F.2d 968, 983 (2nd Cir. 1984); United States v. Texas E. Transmission Corp., 923 F.2d 410, 413 (5th Cir. 1991); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 48 L.Ed.187, 96 S.Ct. 1684 (1976). Decisions of other Courts of Appeals as well as those of the Eleventh Circuit acknowledge that among the wide variety of situations in which a District Court is asked to allow intervention under Rule 24(a)(2), flexibility is necessarily a part of the application of the Rule. Under the rule, obvious among the factors the District Court is to consider are "the interests of the original parties and the interest of judicial administration." See 3B, Moore's Federal Practice, Second Edition, ¶24.07 [1], p. 24-45. Since an application for intervention under Rule 24(a)(2) cannot always be determined by the application of simple black letter law, the factual situation of each application must be carefully examined to determine whether or not the requirements of the Rule have been satisfied. See Moore's Federal Practice, Second Edition, ¶24.07[1] at pp. 24-44 to 24-45, quoting United States v. Texas E. Transmission Corp., 923 F.2d 410, 412 (5th Cir. 1991):

> [I]ntervention may be sought in a wide variety of situations involving unique facts and procedural

> postures ....Because Rule 24 attempts to address all of these situations, the facts and procedural posture of each case are important and it is often true that general rules and past decisions cannot provide uniformly dependable guides.

See Missouri-Kansas Pipeline Co. v. United States of America, 312 U.S. 502, 506, 85 L.Ed. 975, 980, 61 S.Ct. 666, 668 (1941) where Justice Frankfurter, commenting upon Rule 24(a) states:

> Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court.

In Izumi Seimitsu, supra, the Supreme Court in dismissing certiorari as improvidently granted, held separately in its opinion with the intervention question and stated (Izumi Seimitsu Kogyo v. U.S. Philips Corp., 510 U.S. 27, 126 L.Ed.2d 396, 403, 114 S.Ct. 425, 428 (1993)):

> While the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case. Should we undertake to review the Court of Appeals' decision on intervention, it is unlikely that any new principle of law would be enunciated, as is evident from the briefs of the parties on this question. As we said in Yee, Rule 14.1(a) helps us ['t]o use our resources most efficiently' by highlighting those cases that will

> enable us to resolve particularly important questions.' (Citation omitted.)

The Court of Appeals disposition of Petitioners' motion to intervene is simply not such a question. That is to say, as the Supreme Court in Izumi stated, it would not review the Court of Appeals conclusion that "Izumi's interest in preserving the judgment for collateral estoppel purposes was insufficient to provide standing." 126 L.Ed.2d at p. 403 and at p. 400, 114 S.Ct. 428 and at p. 426.

And see Appalachian Power Co. v. Amer. Institute of Cert. Public Accountants, 361 U.S. 83, 4 L.Ed.2d 30, 32, 80 S.Ct. 16, 18, Opinions of Justices in Chambers:

> But ordinarily an application by a District Court of the Rules of Civil Procedure, when affirmed by the Court of Appeals will not be reviewed by this Court.

This is particularly true where, as here, the question is one that concerns the judgment of the District Court in relation to a particular set of facts.

Rule 24(a)(2) permits intervention:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action.

The Court of Appeals correctly determined that:

> The transactions that were the subject of the class action proceeding are the debenture exchange transactions. ABC admits that it is not a real party in interest as to those transactions. Purcell, supra at 1512; Appendix of Petitioners at 8a.

Indeed, Petitioners never asserted an interest in the subject matter of the Purcell litigation but, to the contrary, Petitioners took the position that:

> ...ABC does not seek to litigate the merits of the Purcell dispute and did not ground its intervention motion on the premise that it had an interest in the contested property rights....(ABC) seeks intervention to assert a significant independent interest only in the judicial disposition of the verdict and the judgment entered upon the verdict.

See "Memorandum of Law of Appellants American Broadcasting Companies, Inc. and William H. Willson in Opposition to Motion of Appellees Purcell, et al., Smith, et al. and Chelling, et al. to Dismiss Appeal," filed in the Court of Appeals, December 12, 1994, p .17.

The decision of the District Court in applying Rule 24(a)(2) required consideration of all the competing and relevant interests raised by Petitioners' application for intervention. At the time Petitioners moved for intervention, these three consolidated class actions, consisting of a total of 3,711 Class

Members had reached the settlement stage after 5 years of litigation, including an 11 day jury trial and two appeals. Petitioners' intervention would work substantial prejudice to the original parties to the lawsuit, and effectively vitiate the settlement agreement through which Purcell Plaintiffs were to receive payments. See Purcell, supra, 85 F.3d at 1514; Appendix of Petitioners at 11a. Thus, the Court of Appeals and the District Court each had to examine the factual situation of Petitioners' application for intervention. Because under Rule 24(a)(2), intervention may be sought in a wide variety of situations the facts and procedural posture of this case required an exercise of judgment by both courts below. Faced with a settlement which resolved all of the litigation by the parties in the original Purcell action, the District Court had to consider Petitioners' claim of a "significantly independent interest," an interest not in the merits or substance of the Purcell litigation, but a collateral interest in a related libel case. The District Court therefore had to decide whether to allow an intervention substantially prejudicial to the original parties to the litigation where the interest claimed for intervention was far afield from the substance of the original litigation. See 7C C.A. Wright, et al., Federal Practice & Procedure, Second Edition, §1904 at pp. 239-40. The Court of Appeals held that:

> . . . measured against the Rule 24 requirement that it be a 'direct substantial, legally protectable interest' ABC's interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect, and insubstantial to support intervention as of right. Broadening the right of intervention to cover the circumstances of this case would not only be unprecedented, it would also run counter to the public policy values that are furthered by permitting parties to settle the case without the interference of interlopers. (Citation deleted.)

Purcell, supra, 85 F.3d at 1513; Appendix at 9a.

CONCLUSION

This case involves merely a decision by the Court of Appeals that Petitioners' interest in preserving a verdict and judgment for collateral estoppel purposes in a separate libel action does not qualify as a direct, substantial and legally protectable interest required by Rule 24(a)(2). Though there were over 7,700 limited partners who had received debentures in the exchange transaction, Petitioners at no time owned debentures, nor did they have any interest in the transaction which was the subject of the action. U.S. Bancorp, on which Petitioners rely, involved the preservation of precedent of national importance and the attempted vacatur (to which a party to the action objected) of a final judgment. The judgment in the

instant case was not a final judgment at the time the District Court entered its order of vacatur. In any event, the Court of Appeals, by ruling that Petitioners did not qualify under Rule 24(a)(2) to intervene as of right, expressly did not reach any U.S. Bancorp issue.

Respondents Purcell request that the petition be denied.

Dated: Seattle, Washington
August 22, 1996

Respectfully submitted,

Ray Siderius
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 11 1994
MIGUEL J. CORTEZ
CLERK

NO. 93-4825

JOHN D. PURCELL; DEBRA K. PURCELL;
DOUGLAS K. GROTHE; JOLENE M. GROTHE;
HOWARD HELTON, et al.,

Plaintiffs-Appellees,

versus

BANKATLANTIC FINANCIAL CORP.;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 23, CORP.,

Defendants-Appellants,

SCOTT G. KRANZ; FRANK V. GRIECO;
FIRST EQUITY CORP. OF FLORIDA,

Defendants.

- - - - - - - - - - - - -

WILLIAM A. SMITH;
ELSE M. SMITH, husband & wife;
RICHARD W. HAGEDORN;
ETHEL V. HAGEDORN, husband & wife;
FLOYD G. LAMAR, et al.,

Plaintiffs-Appellees,

versus

BANKATLANTIC FINANCIAL CORP., a
Florida corporation;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 24, CORP., a
Florida corporation,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA,
a corporation,

Defendant.

- - - - - - - - - - - - -

TIMOTHY J. CHELLING,

Plaintiff-Appellee,

versus

BANKATLANTIC FINANCIAL CORPORATION;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 21, CORP.,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

NO. 93-4879

JOHN D. PURCELL,

Plaintiff,

DEBRA K. PURCELL; DOUGLAS K. GROTHE;
JOLENE M. GROTHE; JANE DOE GROTHE;
HOWARD HELTON, DIANA HELTON; JANE DOE
HELTON; WILLIAM E. WALL; SHIRLEY A. WALL,

Plaintiffs-Appellants,

versus

BANKATLANTIC FINANCIAL CORP.;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 21 CORP.,

Defendants-Appellees,

SCOTT G. KRANZ; FRANK V. GRIECO;
FIRST EQUITY CORP. OF FLORIDA,

Defendants.

- - - - - - - - - - - - -

WILLIAM A. SMITH,
ELSE M. SMITH, husband & wife;
RICHARD W. HAGEDORN,
ETHEL V. HAGEDORN, husband & wife;
FLOYD G. LAMAR,
VICTORIA LAMAR, husband & wife;
KENNEDY, HARRY B.,
KENNEDY, MARGARET M., husband & wife;
HERMANN, BERNARD E.; JANE DOE SMITH;
JANE DOE LAMAR; JANE DOE KENNEDY;

Plaintiffs-Appellants,

versus

BANKATLANTIC FINANCIAL CORP., a
Florida corporation;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 24, CORP., a
Florida corporation,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

- - - - - - - - - - - - -

TIMOTHY J. CHELLING,

Plaintiff-Appellant,

versus

BANKATLANTIC FINANCIAL CORPORATION;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 21, CORP.,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

Appeal from the United States District Court for the
Southern District of Florida

Before KRAVITCH, BIRCH and DUBINA, Circuit Judges.

B Y T H E C O U R T:

These appeals are DISMISSED for lack of jurisdiction. The district court's Final Judgment for damages and post-judgment orders are not final and appealable because the court has not disposed of the plaintiffs' equitable claim for rescission. 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); Williams v. Bishop, 732 F.2d 885 (11th Cir. 1984) (per curiam). The parties may seek review of all of the district court's rulings in these cases once the court has disposed of the rescission issue.